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5 **UNITED STATES DISTRICT COURT**  
6 **DISTRICT OF NEVADA**

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8 JAMES RIVER INSURANCE COMPANY, | Case No. 2:11-cv-01879-APG-PAL  
9 Plaintiff, | **O R D E R**  
10 v.  
11 ACE CAB, INC. aka ACE CAB COMPANY,  
12 *et al.*,  
13 Defendants.  
14

15 Before the Court is Plaintiff James River Insurance Company's ("James River") Motion  
16 [Dkt. #50] that judgment not be entered against it based upon its Offer of Judgment. For the  
17 reasons set forth below, the Motion is granted.

18 **I. BACKGROUND**

19 James River's Amended Complaint [Dkt. #26] seeks declaratory relief and recovery of  
20 funds it paid in connection with a claim arising out of a February 3, 2007 automobile accident.  
21 At the time of the accident, defendant Dereje Guale ("Guale") was driving a taxi cab owned by  
22 Ace Cab, Inc., aka Ace Cab Company ("Ace"). Guale collided with a car operated by John N.  
23 Vince ("Vince").

24 At the time of the accident, Ace was covered by a Business Auto Coverage Insurance  
25 Policy issued by Lincoln General Insurance Company ("Lincoln"). In addition, James River had  
26 issued a Commercial Excess Liability Policy to Frias Holding Company (the "James River Excess  
27 Policy"); Ace was a scheduled insured under the James River Excess Policy.  
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1       On January 13, 2009, Vince filed a state court lawsuit against Guale and Ace. Prior to  
2 notifying James River of the lawsuit, Ace and Lincoln were presented with a demand to settle the  
3 underlying lawsuit within the primary limits, but failed to do so. James River contends that the  
4 underlying lawsuit should have settled within Lincoln's primary policy limits of \$1,000,000.00.  
5 Ultimately, the underlying case was resolved for an amount in excess of the primary policy limits  
6 only after contribution from James River. James River initiated the present action against Ace,  
7 Guale, and Lincoln seeking, among other things, to recover the amount it paid out in the  
8 underlying lawsuit.

9       On February 7, 2013, Lincoln served James River with an Offer of Judgment, whereby  
10 Lincoln offered to allow judgment to be taken against Lincoln for \$1,000.00. In response and  
11 also on February 7, 2013, James River served a counter Offer of Judgment to Lincoln in the sum  
12 of \$550,000.00. On February 12, 2013, Lincoln filed its Notice of Acceptance of Offer of  
13 Judgment [Dkt. #46]. Upon receipt of this document, James River realized a mistake had been  
14 made in its counter Offer of Judgment. Specifically, James River intended its offer to allow  
15 judgment to be taken in its favor and *against Lincoln* in the amount of \$550,000.00; however, the  
16 offer that was served mistakenly offered to allow judgment *in favor of Lincoln* rather than in  
17 favor of James River. Upon recognizing this mistake, that same day James River filed a Notice of  
18 Withdrawal and Errata to Offer of Judgment [Dkt. #47], correcting the mistake and making a new  
19 Offer of Judgment to Lincoln.

20       On February 13, 2013, pursuant to the first (incorrect) offer, the clerk of court mistakenly  
21 entered a Clerk's Judgment [Dkt. #48] in favor of James River and against Lincoln for  
22 \$550,000.00. Obviously, the clerk likewise did not catch the mistake in James River's first offer.  
23 Later that day, the clerk was notified by defendants' counsel that the Judgment was incorrect,  
24 whereby the Clerk's Judgment was stricken and vacated. [Dkt. #49]. Counsel was advised to file  
25 an amended and corrected Notice of Acceptance of Offer of Judgment, and the Clerk's office  
26 would enter a new judgment. [Id.] No new judgment has yet been entered.

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1           James River now moves this Court for an Order prohibiting judgment from being entered  
2 on its mistaken Offer of Judgment. [Dkt. #50]. James River contends that Lincoln was, or should  
3 have been, aware of the inadvertent mistake contained in that Offer, but nevertheless accepted it.  
4 James River seeks relief from the accepted erroneous Offer of Judgment by Lincoln based on  
5 mistake, inadvertence and/or excusable neglect.

6           **II. ANALYSIS**

7           Rule 68 offers should be governed and construed according to ordinary principles of  
8 contract law, and (under certain limited circumstances) may be revocable when a mistake is  
9 made. *Fisher v. Stolaruk Corp.*, 110 F.R.D. 74, 76 (E.D. Mich. 1986). Offers made pursuant to  
10 Rule 68 can be revoked only in very limited circumstances. *Cesar v. Rubie's Costume Co.*, 219  
11 F.R.D. 257 (E.D.N.Y. 2004). The court in *Fisher* adopted a four-part test for determining when  
12 an offering party is entitled to rescission: 1) the mistake must be sufficiently consequential that  
13 enforcement of the contract would be unconscionable; 2) the mistake must be material; 3) the  
14 mistake must have not been caused by negligent conduct; and 4) it must be possible to place the  
15 plaintiff in the same position it was in *ex ante*. 110 F.R.D. at 76. Rule 68's effectiveness in  
16 encouraging settlements will not be undermined by permitting a mistaken offer to be revoked  
17 when the mistake is discovered before (or shortly after) acceptance and revocation is sought  
18 immediately thereafter. *Cesar*, 219 F.R.D. at 260. Obviously, the court must exercise extreme  
19 caution when reviewing such circumstances to prevent parties from engaging in gamesmanship  
20 with Rule 68 offers. Such gamesmanship is not present here.

21           James River satisfies the *Fisher* four-pronged test. First, enforcement of James River's  
22 mistaken offer would be unconscionable. James River has asserted claims for declaratory relief  
23 and equitable subrogation against Lincoln, but Lincoln has not asserted any counterclaims against  
24 James River. It would be unconscionable to enforce an offer of judgment that awarded \$550,000  
25 to a party that is not seeking to recover any damages in the lawsuit.

26           Second, the mistake was material given the significant amount of the offer (\$550,000) and  
27 the fact that the receiving party (Lincoln) is not claiming any damages.

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1           Third, the mistake was not caused by negligent conduct. The facts here are analogous to  
 2 those in *Cesar*. *Id.* at 261. There, the Court concluded that although defendants' counsel  
 3 appeared to have demonstrated a degree of negligence, such negligence amounted to a clerical  
 4 mistake that any reasonable attorney could have made. *Id.* A similar clerical mistake was made  
 5 here, as defense counsel inadvertently interchanged the names of the parties.

6           Fourth, as in *Cesar*, the offer, revocation and acceptance occurred over a very short period  
 7 of time. *Id.* Lincoln has no claims for damages against James River and therefore no reasonable  
 8 expectation of entitlement to the same. Thus, Lincoln has suffered no prejudice and can be  
 9 restored to its *ex ante* position.

10          Based on the foregoing, James River is entitled to revoke its mistaken Offer of Judgment,  
 11 and no judgment may be entered based upon it.<sup>1</sup>

12          Finally, Lincoln requests that if James River's erroneous Offer of Judgment is revoked,  
 13 then James River's Errata to Offer of Judgment [Dkt. #47] that corrected the error likewise should  
 14 be stricken. James River does not oppose this request. Under the circumstances of this case,  
 15 fairness and equity dictate that result.

16          **III. CONCLUSION**

17          For all the foregoing reasons, James River's Motion [Dkt. #50] is GRANTED. The  
 18 erroneous Offer of Judgment is revoked and Judgment shall not be entered upon it. In addition,  
 19 James River's Errata correcting the Offer of Judgment [Dkt. #47] is stricken.

20          Dated this 21<sup>st</sup> day of June, 2013.



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 22          ANDREW P. GORDON  
 23          UNITED STATES DISTRICT JUDGE

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 25          <sup>1</sup> Although no judgment has been entered based upon the mistake offer, James River  
 26 alternatively seeks relief under FRCP 60(b). FRCP Rule 60(b)(1) provides that "the court may  
 27 relieve a party or its legal representative from a final judgment, order, or proceeding for . . .  
 28 mistake, inadvertence, surprise, or excusable neglect. . . ." Rule 60(b) provides a procedural  
 device for relief from a Rule 68 judgment. *Richardson v. Nat'l R.R. Passenger Corp.*, 49 F.3d  
 760, 765 (D.C. Cir. 1995). Given the foregoing ruling allowing James River to revoke its offer,  
 James River's request for relief under Rule 60(b) is moot. Nevertheless, had it not been moot, the  
 court would have granted such relief.